IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1449

DAVID A. HARTMAN, RAYMOND V. MILLER, and RICHARD G. COOMBE,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA

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Washington, D.C. • THIEL PRESS • (202) 638-4521

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA

Petitioners David A. Hartman, Raymond V. Miller, and Richard G. Coombe, pray that a Writ of Certiorari issue to review a final judgment of the Circuit Court of Prince William County, Virginia.

PROCEEDINGS BELOW

No formal opinion has been published in this case. The trial judge issued a letter opinion denying Petitioners' pre-trial motions to suppress. The Supreme Court of Virginia

declined to review the trial court proceedings. The opinions, Orders and Judgments of these courts are set forth in the Appendix.

JURISDICTION

The question presented here was first raised before trial in motions to suppress evidence. The trial judge denied the motions by letter opinion. Petitioners' cases were consolidated for trial, and they were convicted of sodomy in violation of Va. Code §18.2-361. Each petitioner was sentenced to five years in prison; the sentences were then suspended. A Petition for Appeal was timely filed in the Supreme Court of Virginia. On December 18, 1978, that court declined to review the case. The jurisdiction of this court is founded on 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the Fourth Amendment is violated by routine, clandestine, warrantless police surveillance, without probable cause, of persons temporarily occupying a toilet stall in a public restroom, through small ceiling vents designed and constructed exclusively for that purpose, in search of suspected criminal activity.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Facts:

The facts in all three cases are virtually identical and undisputed. Each of the petitioners was arrested for acts of sodomy committed inside an enclosed toilet stall in a public restroom. On October 15, 1977, Petitioner Hartman was observed by Virginia State Trooper Gary A. Morris, who had positioned himself in the attic of a public restroom facility located in a rest area on westbound Interstate Highway 66 in Prince William County, Virginia. (Tr. I (1/6/78) 3). Trooper Morris maintained a vigil of the restroom through a false vent with a dummy grate which had been installed by the Virginia Department of Highways for that specific purpose.[1] (Tr. I 3, 5, 18; Tr. II (3/6/78) 28). The vigil had gone on for one-half hour before Petitioner Hartman's arrest (Tr. I 4) and for hours at a time on other occasions. (Tr. I 33).

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[1] The vents are installed in both the mens and women's toilets and are accessible from a locked maintenance closet. (Tr. I 5). They each have adjustible louvers which can be opened or closed to give different angles of vision and appear to be air vents for heating or air conditioning (Tr. I 18).

From his position, Trooper Morris could peer directly into the three enclosed toilet stalls[2] in the restroom unbeknownst to the occupants thereof. Petitioner Hartman was observed by Trooper Morris to engage in an act of sodomy with another individual inside one of the stalls. (Tr. I 12-13; Tr. II 36). All of Trooper Morris' observations of Petitioner Hartman were mde through this dummy vent. (Tr. I 14; Tr. II 37).

Petitioner Miller was observed by Virginia State Trooper D.L. Thompson in an identical fashion on October 15, 1977, in the men's restroom in the rest area on the eastbound side of Interstate 66 in Prince William County, Virginia (Tr. I 19-25; Tr. II 22-28). Petitioner Coombe was likewise observed by Trooper Thompson through the false vent on October 23, 1977, and arrested for committing an act of sodomy. (Tr. II 28-32).

In all three cases, the troopers had no information regarding the petitioners. They were conducting a routine clandestine, warrantless surveillance at the time. Similar surveillances, some of which were hours long at a time, had been routinely conducted at the I-66 location for months, particularly on weekends. (Tr. I 25, 33; Tr. II 30).

Proceedings in the Court Below:

Petitioners Hartman and Miller's Fourth Amendment contention here was the subject of briefing before trial on a motion to suppress evidence. Petitioner Coombe made

[2]The stalls are standard metal partitions similar to those used to enclose public toilets almost everywhere, with a door in front which closes and locks from the inside. The side partition and the door are about six feet in height and have a 18" gap at the bottom. (Tr. I 4, 7-8). Photographs of the restroom and stalls are in the record.

the identical argument in an oral motion on the day of trial. (Tr. II 11-22). The trial judge denied Petitioners Hartman and Miller's motion by letter opinion dated February 28, 1978, (Appendix at 1a), refused to reverse himself at trial (Tr. II 22), and denied Petitioner Coombe's motion from the bench at trial. (Tr. II 21-22).

The trial judge cited no authority for his decision, which read as follows:

> Simply and briefly, I do not believe that it can be successfully argued that the defendants . . . are entitiled to have a reasonable expectation of privacy under the circumstances and I would distinguish cases of this nature and hold inapplicable the principals (sic) enunicated by the Court in *Katz* v. United States, 389 U.S. 347, relied on by the defendants. (Appendix at 1a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE SQUARELY RAISES AN IMPORTANT ISSUE UNDER THE FOURTH AMENDMENT WHICH HAS BEEN DECIDED IN SUCH A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN *KATZ v. UNITED STATES.*

In the instant case, police, acting without either a warrant or probably cause, routinely surveilled enclosed toilet stalls by looking down into the stalls through false vents in the ceiling. This conduct is flagrantly violative of the protection accorded individuals against unreasonable searches and seizures as provided by the Fourth Amendment and interpreted by this Court in *Katz v. United States*, 389 U.S. 347 (1967). The court in *Katz*, rejecting the contention that the concept of " 'constitutionally protected areas' . . . can serve as a talismanic so-

lution to every Fourth Amendment problem" 389 U.S. at 351, n. 9, stated instead that:

> . . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (citation omitted) But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (citation omitted) 289 U.S. at 351-252.

Katz upheld the individual's right to be fee from warrantless electronic auditory surveillance when in an enclosed telephone booth. The Court, in recognizing the applicability of the Fourth Amendment's protection to that situation, stated:

> No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. 389 U.S. at 352 (footnotes omitted).

The situation in this case virtually replicates *Katz*. An individual's expectation of visual privacy in a completely enclosed toilet stall is precisely equivalent to an individual's expectation of aural privacy in a completely enclosed phone booth. If there was not an expectation of privacy in each of these situations, there would be no reason for the enclosures to exist. There would be no more purpose in constructing a toilet stall enclosed on four sides if visual access could be gained from the ceiling than there would be in constructing an enclosed telephone

booth if conversations could be overheard by means of eavesdropping devices. The very fact that the toilet stalls were enclosed in such a fashion demonstrates that they were "temporarily private place(s) whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." 389 U.S. at 361 (Harlan, concurring).

As the Minnesota Supreme Court stated in declaring unconstitutional the surveillance of a department store toilet by a method akin to that used here,

> The store could have removed the doors if it saw fit, so that anyone using the facilities would have no expectation of privacy; or it could have posted signs warning anyone using the facilities that they were apt to be under surveillance. *But once facilities are provided wherein those using them properly are assured of privacy, the store has no right to destroy that privacy without the consent, actual or implied, or one to whom it has been assured. State v. Bryant,* 177 NW 2d 800, 804 (1970) (emphasis supplied.)

The Fourth Amendment violation here is not only the visual mirror image of *Katz*, it is in actuality far more egregious. The agents in *Katz* were assumed to have had probable cause to install a listening device. Here, there was no showing of probable cause upon which a "detached and neutral magistrate" could justify the intrusion. The police simply set up a routine and ongoing surveillance.

The police testified that hundreds of people were surveilled in this manner[3], though no showing was made

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[3]Trooper Morris testified that he saw "a minimum of 200, closer to 300 people" visit the restroom in one night. (Tr. I 33).

that probable cause existed as to any one individual, including petitioners. In sanctioning this massive violation of fundamental rights, the Circuit Court of Prince William County, Virginia has placed itself squarely in opposition to the holding of *Katz* and the principles espoused therein. Correction by this Court is therefore both appropriate and necessary.

II.

A REVERSAL OF THE DECISION OF THE TRIAL COURT IS NECESSARY TO EFFECTUATE THE UNIFORM ENFORCEMENT OF RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.

The trial court, in holding that the police surveillance in this case was not violative of the Fourth Amendment. has placed itself in opposition to courts in five states which have passed on this question. The Minnesota[4] and California[5] Supreme Courts have found similar surveillance violative of the Fourth Amendment as have state courts in Maryland[6], Pennsylvania[7], and Texas[8]. In the

[4] *State v. Bryant*, 177 N.W. 2d 800 (Minn., 1970).

[5] *People v. Triggs*, 106 Cal. Rptr. 408, 506 P.2d 232 (1973). See also *Bielecki v. Superior Court of Los Angeles*, 57 Cal.2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962) and *Britt v. Superior Court*, 58 Cal.2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962).

[6] *Brown v. State of Maryland*, 3 Md. App. 90, 238 A.2d 147 (1968). *Brown* was a pre-trial deposition in which the Court of Appeals of Maryland stated that "we believe that a person who enters an enclosed stall in a public toilet, with the door closed behind him, is entitled, at least, to the modicum of privacy its design affords, certainly to the extent that he will not be joined by an uninvited guest or spied upon by probing eyes in a head physically intruding into the area." 238 A.2d at 149.

[7] *Commonwealth v. Demchak*, 380 A.2d 473 (Pa. Super., 1972).

[8] *Buchanan v. State*, 471 S.W.2d 401 (Texas Crim. App. 1971).

only post-*Katz* federal court decision involving this question, *Kroehler v. Scott*, 391 F. Supp. 1114 (E. D. Pa. 1975), the State of Pennsylvania was enjoined, on the basis of the *Katz* decision, from conducting routine surveillance, through means identical to those used in this case, of toilet stalls in the Penn Central Railroad Station. The only federal case supporting the Virginia decision is the pre-*Katz* case of *Smayda v. United States*, 352 F. 2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).[9] *Smayda*, decided by a divided Ninth Circuit, was bottomed in part on the theory that the lack of a physical trespass precluded any finding of a Fourth Amendment violation. 352 F.2d at 256. *Katz* expressly repudiated this legal theory and overruled the case of *Goldman v. United States*, 316 U.S. 129 (1942), on which the *Smayda* Court had relied.[10]

The decision in this case precludes citizens of the state of Virginia from enjoying the same Fourth Amendment protections granted to citizens of Maryland, Pennsylvania Minnesota, California and Texas. This is an inherently undesirable situation, as the enforcement of a fundamental federal right should not depend in any part upon one's geographical location.

[9] *See also, Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969), relying on *Smayda*.

[10] To the extent that *Smayda* is viewed as having continued vitality, the conflict with the District Court for the Eastern District of Pennsylvania's decision in *Kroehler* provides additional justification for the granting of certiorari.

III.

THERE ARE COMPELLING REASONS WHY THIS COURT SHOULD NOW REACH THE ISSUE RAISED IN THIS CASE.

The Circuit Court, in upholding Virginia State police surveillance of enclosed places in public areas, has established a precedent whose application is not limited to the facts of these cases. Under the rationale of this decision, police surveillance is not limited to public toilets. The rooms where department store customers change clothing could also be surveilled,[11] as could theatre and nightclub dressing rooms. Many banks have small locked rooms which serve the purpose of enabling the owners of valuables normally kept in a strongbox placed in the bank vault to examine their possessions. Cameras, or peepholes, or vents could be placed in these areas as well. Moreover, if surveillance is permitted into private enclosures within public areas, there would be nothing to prevent law enforcement officials from surveilling areas, such as locker rooms, which individuals share with the expectation that their words and visages "will not be broadcast to the world." *Katz, supra* at 352.

We live in a time when human privacy is steadily decreasing. Improved communications and surveillance devices, population pressures, and a multitude of other factors have combined to diminish, year by year, the privacy our forefathers held sacred. *See Olmstead v. United States*, 277 U.S. 438, 473-474 (1928) (Brandeis, dissenting). This case does not feature such spectaculr depredations as midnight raids on a dwelling or microphones placed in a marital bedroom. However, the placing of

[11] *State v. McDaniel*, 44 Ohio App. 2d 162, 337 N.E.2d 173 (1975), specifically held such a practice violative of the Fourth Amendment.

"peephoes in men's room . . . to catch homosexuals" was specifically condemned by Justice Douglas in *Osborn v. United States*, 385 U.S. 323 (1966), as a practice which

> . . . demonstrate(s) an alarming trend whereby the privacy and dignity of our citiznes is being whitted away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will. *Osborn v. United States*, 385 U.S. at 343 (Douglas, dissenting).

The police practice at issue here may not pose an immediate and drastic threat to the very existence of civil liberties in this republic, but it is more than just one of a series of "imperceptible steps." The actions of the Virginia State Police constitute a particularly degrading intrusion into one of the most private activities of life, and render this case an appropriate vehicle for this court to re-emphasize this nation's commitment to the fragile principle that the government's law enforcement goals shall not be achieved at the cost of degrading its citizenry and depriving them of their fundamental constitutional rights.

CONCLUSION

For the reasons stated petitioner requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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On Brief:
BARRY WOLF, ESQ.
FREDERICK W. FORD, ESQ.

APPENDIX

APPENDIX

THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY
CITIES OF MANASSAS AND MANASSAS PARK

[SEAL]

CIRCUIT COURT CHAMBERS
9302 PEABODY STREET
MANASSAS, VIRGINIA 22110

Arthur W. Sinclair
Percy Thornton, Jr.
Judges

February 28, 1978

JAMES M. LOWE, Esquire
Attorney at Law
117 North Fairfax Street
Alexandria, Virginia 22314

EDWARD L. FOX, Esquire
Assistant Commonwealth Attorney
9400 Peabody Street
Manassas, Virginia 22110

RE: COMMONWEALTH vs. Hartman
and Miller
Criminal Nos. 7383, 7428

Gentlemen:

You are hereby advised of my opinion to deny the motions made by the defendants to suppress the evidence in the captioned cases as I do not agree that the evidence against them was obtained in violation of their Fourth Amendment rights to freedom from unreasonable search.

Simply and briefly, I do not believe that it can be successfully argued that the defendants, who were charged with engaging in homosexual acts in enclosed toilet stalls in public rest rooms, are entitled to have a reasonable

expectation of privacy under the circumstances and I would distinguish cases of this nature and hold inapplicable the principals enunciated by the Court in *Katz v.* United States, 389 U.S. 347, relied on by the defendants.

Very truly yours,

/s/ Arthur W. Sinclair
Arthur W. Sinclair

AWS:dra

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

COMMONWEALTH OF VIRGINIA

vs.

DAVID ANTHONY HARTMAN No. 7383

FELONY-SODOMY

The 6th day of March, 1978, came the Attorney for the Commonwealth and the defendant, DAVID ANTHONY HARTMAN, who stands indicted of a felony, to-wit: SODOMY, appeared before the bar of the Court in accordance with the condition of his recognizance. And came also James M. Lowe, attorney at law, retained by the accused to represent him.

Thereupon, the Court Reporter was sworn.

Whereupon, the accused was arraigned and after private consultation with his said counsel, pleaded NOT GUILTY to the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law.

Whereupon, the defendant, by counsel, moved the Court to reconsider its previous ruling on the motion to suppress, and the Court, after hearing argument of counsel, doth deny the said motion.

Thereupon, the Commonwealth presented its evidence and rested.

Whereupon, the defendant rested without presenting any evidence.

And the Court, having heard the evidence and argument of counsel, doth find the defendant GUILTY as charged in the indictment.

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, on the 12th day of May, 1978, at 10:00 A.M., to which time this case is continued.

And the defendant is continued on bond heretofore entered into.

/s/ Arthur W. Sinclair
Arthur W. Sinclair
Judge

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

COMMONWEALTH OF VIRGINIA

vs.

RAYMOND VERLE MILLER

No. 7428

FELONY - SODOMY

The 6th day of March, 1978, came the Attorney for the Commonwealth and the defendant, RAYMOND VERLE MILLER, who stands indicted of a felony, to-wit: SODOMY, appeared before the bar of the Court in accordance with the condition of his recognizance. And came also James Lowe, attorney at law, retained by the accused to represent him.

Threupon, the Court Reporter was sworn.

Whereupon, the accused was arraigned and after private consultation with his said counsel, pleaded NOT GUILTY to the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law.

Whereupon, the defendant, by counsel, moved the Court to suppress the evidence of the Commonwealth and the Court after hearing argument of counsel, doth deny the said motion.

Thereupon, the Commonwealth presented its evidence and rested.

Whereupon, the defendant rested without presenting any evidence.

And the Court, having heard the evidence and argument of counsel, doth find the defendant GUILTY as charged in the indictment.

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer to thoroughly investigate and report to the Court as provided by law, on the 12th day of May, 1978, at 10:00 A.M., to which time this case is continued.

And the defendant is continued on bond heretofore entered into.

/s/ Arthur W. Sinclair
Arthur W. Sinclair
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF PRINCE WILLIAM

COMMONWEALTH OF VIRGINIA

vs.

RICHARD GORDON GOODE No. 7426

FELONY - SODOMY

The 6th day of March, 1978, came the Attorney for the Commonwealth and the defendant, RICHARD GORDON COOMBE, who stands indicted of a felony, to-wit: SODOMY, appeared before the bar of the Court in accordance with the condition of his recognizance. And came also James Lowe, attorney at law, retained by the accused to represent him.

Thereupon, the Court Reporter was sworn.

Whereupon, the accused was arraigned and after private consultation with his said counsel, pleaded NOT GUILTY to the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law.

Whereupon, the defendant, by counsel, moved the Court to suppress the evidence of the Commonwealth and the Court after hearing argument of counsel, doth deny the said motion.

Thereupon, the Commonwealth presented its evidence and rested.

Whereupon, the defendant rested without presenting any evidence.

And the Court, having heard the evidence and argument of counsel, doth find the defendant GUILTY as charged in the indictment.

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, on the 12th day of May, 1978, at 10:00 A.M., to which time this case is continued.

And the defendant is continued on bond heretofore entered into.

/s/ Arthur W. Sinclair
Arthur W. Sinclair
Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday, the 18th day of December, 1978.

David Anthony Hartman,
Raymond Verle Miller and
Richard Gordon Coombe, Appellants,

against Record No. 781113
Circuit Court Nos. 7383,
7426 and 7428

Commonwealth of Virginia, Appellee.

From the Circuit Court of Prince William County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A copy,

Teste:
Allen L. Lucy, Clerk
By: Richard R. Barish
Deputy Clerk
